IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO. 77-5353

RUFUS JUNIOR MINCEY, Petitioner

-vs-

STATE OF ARIZONA, Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

REPLY BRIEF FOR THE PETITIONER

RICHARD OSERAN
Attorney at Law
111 S. Church Avenue, Suite 102
Tucson, Arizona 85701
Telephone: (602) 884-7990

KLEIN & KLEIN
FREDERICK S. KLEIN
Attorney at Law
903 Pioneer Plaza Building
100 N. Stone Avenue
Tucson, Arizona 85701
Telephone: (602) 623-3436

Attorneys for Petitioner

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ARGUMENTS I AND II

I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF MR. MINCEY'S RESIDENCE AFTER THE RESIDENCE HAD BEEN SECURED BY POLICE VIOLATED MR. MINCEY'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

A. ARIZONA'S MURDER SCENE EXCEPTION VIOLATES THE PRINCIPLES OF THE FOURTH AMENDMENT.

The Respondent argues that Arizona's "murder scene exception" is constitutional in that it is "reasonable" and there is a "public need" for an exception to the warrant requirement. Respondent argues as though there were no long line of cases establishing the purposes of the Fourth Amendment, the general application of the warrant requirement, and the purposes of the warrant requirement. It is as if Respondent believes that the Fourth Amendment requires only some vague balancing test which yields to every assertion of police

Richard Osman
LAWYER SUITE 102
111 SOUTH CHURCH TUCSON, ARIZONA 85701
602/884-7980

expediency. Nowhere in Respondent's Brief are the purposes of the warrant requirement mentioned or discussed. Compare Pet. Br. 12-14.

The Respondent argues, in effect, (1) that homicides and severe batteries are serious matters, (2) that there is some undefined need for an immediate, expedient search in all such cases which cannot be forestayed by the necessity of obtaining a judicial warrant, and (3) that "common sense" dictates that when a police officer discovers what he believes to be the scene of a crime, he proceeds to investigate and search the scene. If these are sufficient justifications for Arizona's exception, they are equally applicable to crime investigation in general and would justify the discarding of the warrant requirement.

The search of Mr. Mincey's home began on October 28, 1974, a Monday, during regular court business hours. In Arizona a judicial search warrant may be obtained at any time by as simple a means of communication as a telephone call. 5 Ariz.Rev. Stat. Ann. §13-1444(C)(Supp. 1977). Nowhere in Respondent's Brief does Respondent give a single concrete example of any injury which might have been done to the prosecution had the search been delayed long enough to obtain a telephonic search warrant--assuming arguendo, of course, that probable cause for such a search could have been found

1. The failure herein to specifically mention any specific allegation, citation of authority or argument contained in the Respondent's Brief should not be deemed a waiver or admission of such allegation, authority or argument.

2. References to Petitioner's Brief herein will be abbreviated (Pet. Br. ___); to Respondent's Brief herein will be abbreviated (Resp. Br. ___); and to the Appendix volume herein will be abbreviated (App. ____).

3. For citations to portion of record not appearing in App. the following abbreviations will be used:

Mincey's handwritten statement appended to brief (App. Br. ___);
Trial Transcript (T.T. _____);
Grand Jury Transcript (G.J.T. ____);
Hearing Transcript January 31, 1975 (H.T.J. ____);
Hearing Transcript February 3 and 4, 1975 (H.T.F. ____).

by a neutral detached magistrate.

From the point of view of a victim, every crime is serious. Certainly, requiring a search warrant where no exigent circumstances make the obtaining of a warrant impractical, does not indicate that the alleged crime being investigated is any less serious. Requiring a search warrant where no exigent circumstances make the obtaining of a warrant impractical, in no way interferes with any interest the public may have "in the prompt apprehension of the party or parties responsible for the acts of violence" (Resp. Br. 6) or in "fast and efficient criminal investigation." (Resp. Br. 70). What requiring a search warrant does do is insure that those sworn to enforce the law will strictly obey the law of the land which protects an individual's reasonable expectation of privacy. It is a far more potent safeguard than some nebulous concept of "common sense".

Respondent argues that the police lawfully entered Mr. Mincey's home. While Petitioner does not concede that the police did lawfully enter Mr. Mincey's home,[4] it should be noted that this is an issue separate and apart from the issue of the lawfulness of the search of Mr. Mincey's home. Simply because police may lawfully enter a person's home to make an arrest does not mean that a person thereby surrenders his reasonable expectation of privacy regarding what is inside his closed drawers, what is concealed within the pockets of clothes which are not on his person, what is inside his closed medicine chest, etc. In that regard, this Court has said:

> "[W]e cannot join in characterizing the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor'. And we can see no reason why, simply because some interference with an individual's privacy and freedom of movement

[4] The lawfulness of the entry herein was an issue at Mr. Mincey's first trial and will undoubtedly be an issue at his retrial on murder and assault charges. Cf. People v. Polito, 42 Ill.App.3d 372, 355 N.E.2d 725 (1976), cert. denied, sub nom. Illinois v. Polito, 98 S.Ct. 220 (1977).

has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require". Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

Similarly, Fourth Amendment restraints upon the right to search do not preclude an officer's coming onto premises to render emergency aid. Cf. McDonald v. United States, 335 U.S. 451, 454 (1948). But what Mr. Mincey here challenges is the police conduct of a search which had no connection with any consideration of rendering emergency aid. Furthermore, a doctrine which permitted the "humanitarian" search for "wounded and injured" (Resp. Br. 71) would not call for looking for wounded persons inside clothes pockets, drawers, or medicine chests, etc.

Respondent argues that no harm is done by a warrantless search since a criminal defendant can challenge the lawfulness of a search prior to trial. (Resp. Br. 65-67). Of course, if the only hearing held is after a search, then the officer's recollection of circumstances impelling him to search will be colored by his knowledge of what occurred during and after the search. Cf. United States v. Martinez-Fuerte, 96 S.Ct. 3074, 3086 (1976). Such does not occur when the officer must give a sworn statement to a magistrate before any search occurs. Moreover, as this Court has stated:

> "[W]e cannot accept the view that Fourth Amendment interests are vindicated so long as 'the rights of the criminal' are'protect[ed]...against introduction of evidence seized without probable cause'. The Amendment is designed to prevent, not simply to redress, unlawful police action". Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

Respondent claims the "murder scene exception" permits only limited searches. (Resp. Br. 63-68). As Petitioner has previously

noted, the search of Mr. Mincey's home was unlimited (Pet. Br. 13) and Respondent does not claim otherwise. Surely that Arizona's doctrine applies to "cases involving a death scene or the location of a serious personal injury with the likelihood of foul play" (Resp. Br. 64) does not indicate it is limited. According to the figures cited by Respondent (Resp. Br. at App. IV), there were over 20,500 murders in this country in 1974 and again in 1975 and there were over 450,000 aggravated assaults in each of those years. A doctrine which would authorize at least tens of thousands of warrantless searches every year is hardly one of limited application.

B. THE SEARCH OF MR. MINCEY"S HOME WAS NOT A SEARCH INCIDENT TO AN ARREST.

Respondent's assertion that the search here challenged was a search incident to an arrest meets with one immovable obstacle. The search of the premises was begun after the police had secured the premises (App. 27-28) and after the removal of the intermittently unconscious Mr. Mincey (App. 34-35, 41). Officers were kept on the scene 24 hours a day until the investigation was completed. App. 38. The purpose of permitting warrantless searches incident to an arrest is to permit the removal of weapons an arrestee might otherwise use to endanger the arresting officer or frustrate an arrest and to prevent the concealment or destruction of evidence within the arrestee's reach. Chimel v. California, 395 U.S. 752, 763 (1969). There is no search incident to an arrest when the arrestee has been removed from the searched premises and the premises secured by police before any search takes place.

Richard Ostrom
LAWYER SUITE 102
111 SOUTH CHURCH TUCSON, ARIZONA 85701
602/884-7960

II

THE ADMISSION OF MR. MINCEY'S RESPONSES TO POLICE QUESTIONING MADE WHILE MR. MINCEY WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Perhaps the only matter involved in this issue about which Respondent and Petitioner can agree is that this Court "should engage in a close analysis of the record", Resp. Br. 102, as Petitioner is sure it will. Of course, it is the duty of this Court to independently examine the whole record when a claim of a constitutionally protected right is invoked. E.g., Bachellar v. Maryland, 397 U.S. 564, 566 (1970); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966).

Respondent argues that "no greater degree of inconsistency" is required to permit the use of [5]Miranda violative evidence "than that required by prior inconsistent statements". Resp. Br. 90. The developing case law, however, is inapposite. [6]Harris and[7]Haas were designed to deter or combat outright perjury; they were not designed to afford a carte blanche for prosecutorial use of unconstitutional evidence whenever an accused takes the witness stand nor to insinuate perjury when there is none, nor to deter accused persons from taking the witness stand on their own behalf. Cf. Agnello v. United States, 269 U.S. 20 (1925); United States v. Mariani, 539 F.2d 915, 921-24 (2d Cir. 1976). Prior Miranda violative statements which are ambiguous in terms of asserted inconsistency, though they might be sufficient to meet the ordinary rules of evidence for impeachment, are insufficient for purposes of Harris and Haas. E.g. Cf. Doyle v. Ohio, 426 U.S. 610 (1976); Minor v. Black, 527 F.2d 1, 3-4 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976); United States v. Trejo, 501 F.2d 138, 143-45 (9th Cir. 1974); People v. Taylor, 8 Cal.

[5]Miranda v. Arizona, 384 U.S. 436 (1966);
[6]Harris v. New York, 401 U.S. 222 (1971);
[7]Oregon v. Haas, 420 U.S. 714 (1975)

3d 174, 104 Cal.Rptr. 350, 501 P.2d 918 (1972), cert. denied, 414 U.S. 863 (1973); Dornau v. State, 306 So.2d 167 (Fla.App. 1974), cert. denied, 422 U.S. 1011 (1975); State v. Kidd, 375 A.2d 1105, 1112-16 (Md. App.), cert. denied, 46 U.S.L.W. 3390 (Dec. 13, 1977); People v. Wilborn, 57 Mich.App. 277, 225 N.W.2d 727 (1975); Commonwealth v. Woods, 455 Pa.1, 312 A.2d 357 (1973), cert. denied, 419 U.S. 880 (1974). More than a little ambiguity exists in the statements used in cross-examination--in the undefined reference to "the Guy" (Pet. Br. 8a) and in the use of the term "bust" (Pet. Br. 6a) after Mr. Mincey had been advised by the interrogator that the people who had swarmed into Mr. Mincey's apartment were police trying to make arrests. Prior to that response, Mr. Mincey's statement also contained the following notation: "I don't know who the police man was which one was the nark [sic]. Did he have on cowboy boots." (Pet. Br. 5a).

The issue of consistency was particularly troubling to the trial court in this case. T.T. (June 5, 1975) 208-217. The untruthworthiness of Mr. Mincey's hospital statements derives not only from his confused condition at the time the statements were made (E.g. Pet. Br. 3a, 4a and 5a; App. 92-93), but also from the fact that Mr. Mincey's responses are virtually meaningless without knowing the questions they were answering and the fact that no accurate record of the questions was kept. As Respondent concedes, Resp. Br. 33, Detective Hust made notes regarding his questions the day after the interrogation and relied for his testimony upon a report he prepared a week after the interrogation. Cf. United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977). See also T.T. (June 5, 1975) 208-217.

With regard to the involuntariness of the statements, Mr. Justice White's concurring opinion in Michigan v. Mosley, 423 U.S. 96 (1975) is instructive. There it was noted:

> "[T]he accused having expressed his own view that he is not competent to deal with the authorities

Richard Oseran
LAWYER SUITE 102
111 SOUTH CHURCH TUCSON, ARIZONA 85701
602/884-7993

without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism". 423 U.S. 96, 110 n.2 (1975) (White, J., concurring).

Respondent lays great emphasis upon Detective Hust's testimony (Resp. Br. 34-47, 109-110 and at Appendix 1 of said brief) in an apparent attempt to show not simply that Mr. Mincey's statements were voluntary, but even that they were not obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). It is notable that the trial court which heard Hust's testimony disbelieved his assertions that Mr. Mincey waived his rights to counsel and to remain silent and granted the motion to suppress the statements except with regard to impeachment use (App. 74); and the Arizona Supreme Court also disbelieved Hust's head nodding testimony (App. 105-106). Without Hust's asserted head nodding, that is, relying only on the statements Mr. Mincey is known to have made (since he could not speak at the time, his statements were written--Pet. Br. at 1a-9a), the evidence indicates not a waiver of rights, but a repeated invoking of the rights to counsel and to remain silent and repeated disregard of those rights by the interrogating officer. Detective Hust's testimony of head nodding by Mr. Mincey becomes even more incredible when one considers how painful such behavior would have been to a patient in the intensive care unit who had an intertracheal tube down his throat and a nasal-gastric tube down his gullet.

Respondent asserts that "there is no evidence of what the effects" of the drugs given Mr. Mincey at the time he was admitted to the hospital were (Resp. Br. 115-116), but Respondent also notes that "[i]n the presence of physical dependence on narcotics, Narcan will produce withdrawal symptoms". Resp. Br. 49 and at Appendix III of said brief. If anything, this indicates yet another source of pain and stress lowering Mr. Mincey's will to resist. The drugs

administered must have produced withdrawal symptoms since there is ample evidence of Mr. Mincey's heroin addiction and his requests to the Air Force for treatment. E.g. App. 109; T.T. (June 5, 1975) at 159, 189, 200; T.T. (June 6, 1975) at 267-272, 304. The parties agree that Narcan was administered within three or four hours of the interrogation. Pet. Br. 6; Resp. Br. 31; App. 43-44.

CONCLUSION

Petitioner continues to rely on all matters raised in his opening brief. For the reasons expressed therein and for the foregoing reasons, the judgment of the Arizona Supreme Court should be reversed and this Court should hold the admission at Mr. Mincey's trial of evidence obtained in the search of Mr. Mincey's residence and of evidence obtained in the in-hospital interrogation denied Mr. Mincey due process of law.

Respectfully submitted this 15th day of February, 1978.

RICHARD OSERAN
Attorney at Law
111 S. Church Avenue, Suite 102
Tucson, Arizona 85701
Telephone: (602) 884-7990

KLEIN & KLEIN

By: Frederick S. Klein
FREDERICK S. KLEIN
Attorney at Law
903 Pioneer Plaza Building
100 N. Stone Avenue
Tucson, Arizona 85701
Telephone: (602) 623-3436

Attorneys for Petitioner

February, 1978

AFFIDAVIT OF SERVICE OF BRIEF

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

RICHARD OSERAN, being first duly sworn, deposes and says: That he is one of the attorneys for the Petitioner in the above-entitled action, and that on the 15th day of February, 1978, he served three copies of the foregoing Reply Brief for the Petitioner on:

PHILIP G. URRY, ESQ.
Attorney General's Office
1005 Pioneer Plaza Building
100 N. Stone Avenue
Tucson, Arizona 85701.

RICHARD OSERAN, ESQ.

SUBSCRIBED AND SWORN TO before me this 15th day of February, 1978, by RICHARD OSERAN.

Patricia A. Barbosky
Notary Public

My Commission Expires:
2/8/80

Richard Oseran
LAWYER Suite 107
111 SOUTH CHURCH TUCSON, ARIZONA 85701
602/884-7660